

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERIGNON BROOKS,	§
	§ No. 282, 2011
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware, in and
	§ for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 1004012732
	§
Plaintiff Below-	§
Appellee.	§

Submitted: November 9, 2011

Decided: December 13, 2011

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 13th day of December 2011, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Perignon Brooks, was found guilty by a Superior Court jury of two counts of Robbery in the First Degree, one count of Attempted Robbery in the First Degree and one count of Conspiracy in the Second Degree. On the first robbery conviction, Brooks was sentenced to 5 years at Level V incarceration, at different levels of supervision. On the second robbery conviction, he was sentenced to 5 years at Level V, at different levels of supervision. On the conviction of attempted robbery, he was sentenced to 5 years,

again at varying levels of supervision. On the conspiracy conviction, he was sentenced to 1 year, at varying levels of supervision.

(2) Brooks' trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(3) Brooks' counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Brooks' counsel informed Brooks of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Brooks also was informed of his right to supplement his attorney's presentation. Brooks responded with a brief that raises several issues for this Court's consideration. The State has responded to the position taken by Brooks' counsel as well as the issues raised by Brooks and has moved to affirm the Superior Court's judgment.

¹ *Penon v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Brooks raises several issues for this Court's consideration, which may fairly be summarized as follows: a) the evidence adduced at trial did not support his conviction of first degree robbery; b) his trial counsel did not inform him that he could move to sever his trial from that of his co-defendant; c) the jury was not properly instructed on lesser-included offenses; d) a witness with a criminal record should have been prevented from testifying; e) the testimony from the victims was not credible and precluded a fair jury verdict; and f) there was prosecutorial misconduct.

(5) The following evidence was presented at trial. Three robberies took place in New Castle County, Delaware, on April 16, 2010. The first robbery victim testified that he was walking in the area of Wellington Woods at about 8:00 p.m. when three African-American men got out of a burgundy Hyundai and approached him. One of the men pointed a firearm at him that looked like an Uzi while the other two went through his pockets. A cell phone, a cigarette lighter, a cigar and a package of Excedrin capsules were taken. The second victim testified that, at about 9:00 p.m. near Castle Brook Apartments, three African-American men approached him as he was walking his dog. One of the men pointed a weapon at him that looked like an Uzi and the others went through his pockets. Finding nothing of value, the men walked off towards DuPont Highway. The victim called 911 to report the crime, and told the dispatcher that he watched the men drive off

in a red car with a Delaware license plate. The third victim testified that, a few minutes after 9:00 p.m., several men in a burgundy vehicle pulled up beside him as he was walking towards the fitness center at Castle Brook Apartments. Two African-American men got out of the vehicle and approached him. The first man pointed an Uzi-like weapon at him and the second took his wallet from his pocket. The wallet had no money in it, but did contain the victim's State identification card, his civil air patrol card and his personal business cards. The robbers then fled towards DuPont Highway. The victim called 911 to report the crime.

(6) Later that evening, based on the information received in the 911 calls, a New Castle County police officer spotted, and unsuccessfully attempted to stop, a 2001 burgundy Hyundai Elantra. A second police officer joined in pursuing the vehicle, which eventually was stopped in a cul-de-sac. The car, which was being driven by a Caucasian woman, was occupied by three African-American men, one of whom was Brooks. A search of the vehicle uncovered an Uzi-like weapon, later determined to be an Airsoft pellet gun, the items taken from the first robbery victim and the business cards taken from the third robbery victim. One of the business cards was later determined to have Brooks' fingerprint on it.

(7) Brooks' first claim is that the evidence adduced at trial did not support his conviction of first degree robbery. He contends that, because he was unarmed during the robberies and was unaware that his co-defendant was armed, he could

only be convicted of second degree robbery. Brooks further contends that he should only have been convicted of attempted second degree robbery in the incident where no property was taken. The record reflects that witnesses testified at trial that Brooks' co-defendant was armed with, and openly displayed, the weapon during all three incidents. Even if Brooks himself did not wield the weapon, there was sufficient evidence that Brooks knew his co-defendant was holding the victims at bay while he went through their pockets. That evidence supported the jury's finding of guilt on the second degree conspiracy² and first degree robbery³ charges beyond a reasonable doubt.⁴ Moreover, because there was evidence that in the second robbery Brooks looked through the victim's pockets but found nothing worth taking, the jury could have found the essential elements of attempted first degree robbery beyond a reasonable doubt.⁵ Because Brooks' robbery convictions were all amply supported by the evidence presented at trial, we conclude that his first claim is without merit.

(8) Brooks' second claim is that his trial counsel did not inform him that a motion could be made to sever his trial from that of his co-defendant. This claim, in essence, constitutes a claim of ineffective assistance of counsel. Because the

² Del. Code Ann. tit. 11, §512.

³ Del. Code Ann. tit. 11, §832(a) (2).

⁴ *Williams v. State*, 539 A.2d 164, 168 (Del. 1988).

⁵ Del. Code Ann. tit. 11, §§531, 832(a) (2).

claim was not adjudicated by the Superior Court in the first instance, we decline to review it for the first time on direct appeal.⁶

(9) Brooks' third claim is that his jury was not properly instructed on lesser-included offenses. Brooks does not explain how the instructions the jury received were deficient. The trial transcript reflects that the jury was instructed on the lesser-included offenses of second degree robbery and attempted second degree robbery. This Court reviews jury instructions to determine whether the instruction correctly states the applicable law and is not so confusing or inaccurate as to undermine the jury's ability to reach a verdict.⁷ There is no evidence in the record that Brooks' jury was given erroneous instructions. To the contrary, the jury instructions correctly stated the applicable law and were neither confusing nor inaccurate. We, therefore, conclude that Brooks' third claim is without merit.

(10) Brooks' fourth claim is that one of the prosecution's witnesses should not have been permitted to testify because he previously had been convicted of shoplifting and theft. Brooks offers no factual support for this claim, nor is there any support for it in the record. The Delaware Rules of Evidence provide that, as long as a potential witness has personal knowledge of the facts to which he will offer testimony, there is no bar to his testimony.⁸ A witness with a criminal record,

⁶ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁷ *Cabrera v. State*, 747 A.2d 543, 544 (Del. 2000).

⁸ D.R.E. 601, 602.

although subject to cross-examination regarding his crimes, would not be barred from testifying about facts of which he has personal knowledge.⁹ For these reasons, we conclude that Brooks' fourth claim is without merit.

(11) Brooks' fifth claim is that the victims' testimony was not credible and precluded a fair verdict. It is well-settled that the credibility of witnesses is a matter exclusively within the province of the jury.¹⁰ Brooks has presented no support for his claim that the victims' testimony was false, nor do we find any such evidence in the record. We therefore conclude that Brooks' fifth claim is without merit.

(12) Brooks' sixth, and final, claim is that the State engaged in prosecutorial misconduct. Specifically, he contends that the prosecutor prejudiced the jury against him by pointing at him numerous times before his counsel's opening statement. The trial transcript reflects that the prosecutor pointed at Brooks several times during his opening statement. However, our review of the record does not support Brooks' claim that the prosecutor engaged in misconduct or that the actions of the prosecutor served to prejudice the jury against Brooks. As such, we conclude that Brooks' final claim also is without merit.

(13) This Court has reviewed the record carefully and has concluded that Brooks' appeal is wholly without merit and devoid of any arguably appealable

⁹ D.R.E. 609.

¹⁰ *Poon v. State*, 880 A.2d 236, 238 (Del. 2005).

issue. We also are satisfied that Brooks' counsel has made a conscientious effort to examine the record and the law and has properly determined that Brooks could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice